

Office of Dispute Resolution for Acquisition
Federal Aviation Administration
Washington, D.C.

Protest of)	
)	
Ribeiro Construction Company, Inc.)	Docket No. 08-TSA-031
)	
Under RFP No. HSTS04-08-R-CT8021)	

**DECISION ON PROTESTER’S REQUEST
FOR SUSPENSION**

This matter arises in connection with a protest (“Protest”) filed with the Federal Aviation Administration Office of Dispute Resolution for Acquisition (“ODRA”) by Ribeiro Construction Company, Inc. (“Ribeiro”) on April 14, 2008. The Protest involves the award of a contract (“Contract”) by the Transportation Security Administration (“TSA”) to the Vic Thompson Company (“Thompson”), arising out of TSA’s Request for Proposal No. HSTS04-08-R-CT8021 (“Solicitation”).

The Contract is for the design and construction of a baggage handling and security screening test facility at the Reagan National Airport (“Project”). The Project is designed to provide the TSA with a Transportation Systems Integration Facility (“TSIF”), wherein the Agency can test luggage screening technology “in an operational environment” rather than solely in a laboratory. TSA Opposition at 1. The Project is a priority of the TSA and directly impacts the security of the national air transportation system. *Id.*

The Ribeiro Protest includes, *inter alia*, a request for suspension of performance of the Contract by Thompson pending the resolution of the Protest (“Suspension Request”). *See* Protest at 17. Both the TSA, and Thompson as the awardee/intervenor in the Protest, have opposed the Suspension Request. For the reasons discussed herein, the ODRA finds that while the Ribeiro Protest has alleged a substantial case, compelling reasons do not support imposing a suspension. The ODRA finds in this regard that: Ribeiro has failed

to demonstrate that irreparable injury will occur in the absence of a suspension; and that the relative harm that would be caused by a suspension, as well as the public interest in a secure transportation system, militate against any suspension-related delay in the completion of the Project. The ODRA therefore declines to suspend, or recommend that the TSA suspend, performance of the Contract pending the resolution of this Protest.¹

I. LEGAL AND FACTUAL BACKGROUND

In the 2001 Aviation & Transportation Security Act (“ATSA”), 49 U.S.C. §114, Congress expressly directed the TSA to utilize the FAA’s Acquisition Management System (“AMS”) for TSA acquisitions. In conformance with the ATSA, the TSA has employed the FAA’s AMS for its acquisitions, as well as for acquisition-related dispute resolution. TSA solicitations direct offerors and contractors to file AMS-related protests at the FAA’s ODRA. *See Protest of GLOCK, Inc.*, 03-TSA-003, Decision on Protester’s Request for Stay of Contract Performance.

The Ribeiro Protest alleges that the TSA’s award to Thompson was improper because: (1) the award resulted from an improper organizational conflict of interest (“OCI”), arising from Thompson’s support of the TSA’s Office of Security Technology (“OST”) Program Office; (2) TSA’s evaluation was conducted on an unequal basis, favoring the awardee while disadvantaging Ribeiro; and (3) TSA improperly waived a Solicitation requirement in favor of Thompson.

In support of the Suspension Request, Ribeiro’s Protest recites, without elaboration as follows:

Ribeiro requests that the ODRA immediately issue an order directing the TSA to suspend any work under the contract. Suspension of contract award performance is permitted by Regulation as this Protest is filed

¹ The ODRA will conduct the final adjudication of the Protest on an expedited basis and will make its Findings and Recommendations to the TSA Administrator at the earliest possible date consistent with the development of a complete administrative record.

within five (5) business days of the conclusion of the post-award debriefing Ribeiro received from TSA.

Protest at 4.²

The Opposition filed by the TSA (“TSA Opposition”) alleges that the Ribeiro Suspension Request does not meet the requirements of Sections 17.15(d) and 17.17 of the ODRA Procedural Rules. More specifically, TSA alleges that Ribeiro:

has not set forth specific compelling reasons for a suspension; it has not supplied facts in support of its position or identified persons with knowledge of facts supporting each compelling reason. Additionally, Protester has not identified any documents that support each compelling reason; nor has it identified or addressed any adverse consequences to the Protester, the TSA, or any other interested party.

TSA Opposition at 6.

TSA further states that the Agency, rather than Ribeiro, will be harmed if the Contract is suspended; and that suspension would jeopardize the national security of the United States. TSA Opposition at 8. Included with TSA’s Opposition is a sworn Declaration of Kenneth Andre Lee, the Program Manager for the TSIF Facility (“Lee Declaration”) explaining the nature of the Project. *See* TSA Opposition at Exhibit 1.

The TSIF will be a one-of-a-kind, integration test and evaluation facility. The TSIF Acquisition is unlike any other contract or project that OST has undertaken. As is reflected in the Solicitation’s contract line items, the TSIF Acquisition covers four primary efforts – design (of facility and Baggage Handling Systems (“BHS”)); construction (of facility and BHS); system operation and maintenance of the BHS; and reconfiguration (more design and construction) of test areas.

Id. at Paragraph 5.

² In a subsequent Reply, discussed *infra*, Ribeiro more specifically addressed the bases supporting its Suspension Request.

The Lee Declaration also discusses the importance of unimpeded deployment of the TSIF, as well as the “critical need” for a functional TSIF Facility. Mr. Lee states, *inter alia*, that baggage handling technology with the capability to screen upwards of 1,000 bags per hour is scheduled to begin operation in August of 2009 and that:

It is imperative that the TSIF be able to thoroughly test this new technology in a fully integrated system to assure that issues with integration, communications, data flow, and any mechanical and electrical problems are resolved. In order to fully test and validate the system for an August 2009 deadline, the facility must be ready no later than early Fall 2008 Suspending work for any amount of time at all will put TSA at a significant risk of not having a security screening system to deliver to airports by summer of 2009. This will not only have a dramatic effect on the TSA, but also on airports and airlines from a security as well as an economic perspective.

Id. at Paragraph 16.

In accordance with the ODRA Procedural Rules, on April 23, 2008, Ribeiro through counsel, filed a Reply to the TSA Opposition to the Suspension Request (“Ribeiro Reply”). The Ribeiro Reply asserts that: (1) Ribeiro has alleged a substantial case; (2) Ribeiro will suffer irreparable harm in the absence of a stay; (3) the harm to Ribeiro in the absence of a stay will be greater than the harm to TSA; and (4) the public interest favors a stay. *See* Reply Ribeiro Reply at 2-9. With respect to whether a substantial case has been alleged, Ribeiro asserts that “at a minimum, Ribeiro’s allegations demonstrate a ‘fair ground for litigation’ or ‘deliberate investigation.’” *Id.* at 2. Ribeiro goes on to point out that in its view the TSA Opposition to the Suspension Request “confirms many of the facts and allegations set forth in Ribeiro’s Protest.” *Id.* at 2, 3-5.

With respect to the irreparable harm prong of the suspension test, Ribeiro’s argument is limited to its assertion that “without a stay of contract performance, there will be no effective relief available to Ribeiro.” *Id.* at 6. Ribeiro cites to the fast track nature of the construction of the Project, stating that “it is possible that by the time Protest concludes, most of the work required under the critical milestones will have been achieved.” *Id.*

Ribeiro also states that it “would not object to a stay of performance for only the CLIN00002 requirements contained in the contract.” *Id.* at 7.

With respect to the relative hardships involved, Ribeiro asserts that “it is disingenuous for the TSA to argue that it will suffer irreparable harm in the event a stay is imposed when it apparently had no problem delaying the milestone dates to accommodate Vic Thompson.” *Id.* at 7, 8. Ribeiro further points out that the functions to be performed at the TSIF Facility “have been performed in the past by TSA at other facilities including the William J. Hughes Technical Center facility in Atlantic City, New Jersey.” *Id.* at 8. Ribeiro notes that the Congressional mandates cited to by TSA “do not include specific deadlines for meeting those mandates” *Id.*

Finally, with respect to the public interest, Ribeiro asserts that given the alleged delays that already have occurred with respect to the Project “a similar delay for the pendency of the ODR A Protest will not create a high probability of placing the entire TSIF program at risk and jeopardize national security.” *Id.* at 9.

In accordance with the ODR A Procedural Regulations, the awardee/intervenor, Thompson, also filed a Reply in support of the TSA’s Opposition to the Suspension Request (“Thompson Reply”). The Thompson Reply cites the alleged failure on the part of Ribeiro to properly support the Suspension Request. *See* Thompson Reply at 3, 4. Thompson goes on to discuss what it alleges to be immediate, irreparable harm it would suffer in the event a suspension is ordered. *See* Thompson Reply at 4 – 7. Finally, Thompson urges that the public interest favors the continuation of contract performance during the pendency of the Protest. *See* Thompson Opposition at 8.

II. DISCUSSION

The ODRA previously has noted that:

The FAA's Acquisition Management System ("AMS") includes a presumption in favor of continuing procurement activities and contract performance during the pendency of bid protests. It expressly provides that contract performance shall continue absent a showing of compelling reasons to suspend or delay. *See* AMS Section 3.9.3.2.1.6. The same presumption is set forth in the ODRA Rules of Procedure. 14 C.F.R. §17.13(g).

Protest of GLOCK, Inc., 03-TSA-003, Decision on Protester's Request for Stay of Contract Performance, October 28, 2003, *citing Protest of J.A. Jones Management Services*, 99-ODRA-00140, Decision on Protester's Request for Stay of Contract Performance, September 29, 1999. *See also, Protest of Knowledge Connections, Inc.*, 06-TSA-024, Decision on Request for Suspension, April 21, 2006. The issue of whether compelling reasons support a suspension will be reviewed:

on a case-by-case basis by looking at a combination of factors including: (1) whether the Protester made out a substantial case; (2) whether a stay or lack of stay is likely to cause irreparable injury to any party; (3) the relative hardships on the parties; and (4) the public interest. Greater emphasis will be placed on the second, third and fourth prongs of the analysis. This approach is consistent with that of the Court of Appeals for the District of Columbia Circuit and provides for a flexible analysis "under which the necessary showing on the merits is governed by the balance of equities as revealed through an examination of the other three factors."

Protest of GLOCK, Inc., *supra*, *citing Crown Communications supra* (quoting from *Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc.*, 559 F.2d. 841, 844 (D.C. Cir. 1997)).

In the instant Protest, Ribeiro raises issues concerning: (1) the impact of an alleged OCI and (2) the allegedly improper conduct of the evaluation. The ODRA finds that these

allegations constitute “a fair ground for litigation and thus for more deliberate investigation” within the meaning of *Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc.*, *supra* at 841, 844, and prior ODRA decisional authority. The fact that Ribeiro has alleged, and ultimately may establish, a substantial case on the merits is not fully determinative of the current suspension issue. Rather, the ODRA must balance the remaining three factors of the test annunciated in *Crown*, *supra*, to determine whether a stay is warranted.

Having done so, the ODRA concludes that the Ribeiro Protest fails to demonstrate that irreparable injury will occur in the absence of a stay. As noted above, Ribeiro’s argument of irreparable injury is limited to its speculative assertion that effective relief possibly will not be available in the absence of a suspension, given the nature and the schedule of the Project work. In essence, Ribeiro’s argument is one of economic loss, *i.e.*, that in the absence of a suspension it will not have the opportunity to perform, and presumably profit from performing, the work. The ODRA has stated on numerous other occasions that economic loss, in and of itself, is not sufficient to support a suspension request. *See Protest of Crown Consulting, Inc.*, *supra*; *Protest of J. A. Jones Management Services*, *supra*. Were it otherwise, a suspension would have to be issued in every case where a significant portion of the work in question might be completed before the Protest could be adjudicated. Such a result would be inconsistent with the strong presumption against suspensions set forth in the AMS. *See* AMS §3.9.3.2.1.6; 14 C.F.R. §17.13(g); *See also Protest of Glock*, *supra*.

Moreover, the ODRA does not accept that no remedy will be available in the absence of a suspension. The ODRA has broad discretion to recommend a broad range of remedies pursuant to 14 C.F.R. §17.21. This discretion includes the authority to recommend, *inter alia*, remedial actions such as directing termination and award of a contract. It has been demonstrated that the Project involves four phases of work and that the first two of these, *i.e.*, design and initial construction, are underway, with completion of the construction to occur in the fall of this year. The ODRA’s Findings and Recommendations are likely to

be forwarded to the TSA Administrator and to the private parties well in advance of completion of the initial construction.³

Even if, assuming *arguendo*, Ribeiro had demonstrated that it would incur irreparable injury in the absence of a suspension, the ODRA would balance any such injury against the other factors. Here, the hardship that would result from the issuance of a stay has been shown to be potentially far greater than that which may occur in the absence of a stay. The ODRA is not persuaded by Ribeiro's assertions that TSA overstates the harm that would be caused by a suspension and that TSA itself delayed progress towards completion of the Project. Any earlier delay allegedly caused by TSA does not detract from the overriding national security concerns identified in the Lee Declaration, Paragraph 16. Rather, in the ODRA's view, any such delay only serves to make it more imperative that the Project move forward expeditiously. The public interest in maximizing the safety and security of the air transportation system at the earliest possible date militates against issuance of a pre-decisional suspension in this case. In sum, the ODRA finds the relative harm and public interest factors outweigh the possible economic injury that may result to Ribeiro in the absence of a stay, and strongly favor allowing contract activities to continue during the pendency of this Protest.

III. CONCLUSION

The ODRA concludes, after balancing the applicable factors, that compelling reasons do not support suspending contract performance during the pendency of this Protest. The

³ Under The AMS, The TSA is not precluded from voluntarily suspending contract performance in the face of a protest, based on urgency, public interest and mitigating programmatic risks. The Agency bears the risk of added cost and delay resulting from any decision to continue contract performance during the pendency of a Protest. See *Protest of All Weather, Inc.*, O4-ODRA-00294, Decision on Protester Request for Stay, F.N. 1.

ODRA therefore denies the Ribeiro Suspension Request and will not impose nor recommend that the TSA Administrator impose a suspension of contract performance during the pendency of the Protest.⁴

-S-

Anthony N. Palladino
Associate Chief Counsel and Director
FAA Office of Dispute Resolution for Acquisition

April 30, 2008

⁴ This is an interlocutory order. It will become final only upon its adoption by the TSA Administrator as part of the Final Order in this matter.